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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 488

FRANK H. FRANTUM AND MINNIE ELEANOR FRANTUM, HIS WIFE,

Petitioners,

VS.

DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the Court of Appeals of Maryland appears in full on pages 9-17 of the Appendix to the Petition for Certiorari, and appears in 214 Md. 100, 133 A. 2d 408.

OBJECTIONS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO GRANT WRIT OF CERTIORARI

There is no question involving (1) a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, (2)

the repugnancy of a state statute to the said Fourteenth Amendment, or (3) the repugnancy of a state statute to the First Amendment of the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment to the Constitution, was ever presented to, or decided by, the Circuit Court No. 2 of Baltimore City, nor to the Court of Appeals of Maryland, in the pleadings, briefs, arguments to or opinions of those Courts. Stated more succinctly, the Petitioners did not even attempt to raise a federal question in either of the Lower Courts, nor did those Courts decide any such question.

It is well settled that the Supreme Court of the United States is without jurisdiction to review the judgment of a State Court by reason of a Federal question which was not raised below, or called to the attention of, or decided by the State Court.

Edelman v. California, 344 U.S. 357, 97 L. Ed. 387;
Dewey v. Des Moines, 173 U.S. 193, 197-198, 19 S. Ct. 379, 43 L. Ed. 665;
New York ex rel. Rosevale Realty Co. v. Kleinert, 268 U.S. 646, 651, 45 S. Ct. 618, 69 L. Ed. 1135;
Whitney v. California, 274 U.S. 357, 362-363, 47 S. Ct. 641, 71 L. Ed. 1095;
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McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-435, 60 S. Ct. 670, 84 L. Ed. 849;
CIO v. McAdary, 325 U.S. 472, 477, 65 S. Ct. 1395, 89 L. Ed. 1741, Wilson v. Cook, 327 U.S. 474, 483, 66 S. Ct. 633, 90 L. Ed. 793;
Earlier Cases collected in Annotations at 49 L. Ed. U.S. 413, 67 L. Ed. U.S. 556.

Not only is the record, including the Petitioners' Brief on Appeal to the Court of Appeals of Maryland, singularly

barren of any suggestion of the invalidity of the statute attempted to be drawn in question in the Petition for Writ of Certiorari herein, or of any suggestion of a denial of due process or equal protection of the laws, but both the majority and dissenting opinions expressly negate any such suggestion. The majority opinion states flatly that:

> "No question has been suggested in this case as to the validity of that clause, * * *" (App. 14).

The dissenting opinion, while questioning the constitutionality of an absolute rule as to religion, recognized that the Maryland Statute is certainly not absolute (App. 17).

The attention of this Honorable Court is directed to the fact that the Petitioners have not complied with Rule 23, 1. (f) of the Revised Rules of the Supreme Court of the United States in not having specified the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised.

It is therefore respectfully submitted that the Petitioners cannot invoke the jurisdiction of this Court under 28 U. S. C. Section 1257(3) not having shown that the validity of a state statute was drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor having shown where any title, right, privilege or immunity was specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

QUESTIONS PRESENTED

The Respondent believes that the questions presented by the Petitioners are moot since the Court has no jurisdiction in this case. The Respondents further believe that even if this Court had such jurisdiction, the questions so

presented are unworthy of its consideration since they not only do not present any substantial Federal question, they include unwarranted conclusions of facts not appearing in the record.

The following questions are believed to present more clearly the issues which the Petitioners have attempted to raise:

1. Does a state statute violate the due process provisions of the Constitution of the United States by declaring that the legislative policy is to prevent (except in three counties), whenever practicable, the adoption of a child by persons of a different religious belief from that of a child or its natural parents?

2. Is such state statute a denial of the equal protection of the laws to petitioners for adoption who are of a religious belief different from that of the child?

3. Does such a statute constitute a law respecting the establishment of religion, or prohibit the free exercise of religion?

4. Does the dismissal of a petition for adoption of a baby on the ground of petitioners' relatively advanced age, constitute a denial of equal protection of the laws or of due process?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution and the Maryland Statute which the Petitioners deem to be pertinent are set forth in the Appendix to the Petition (App. 17, 18).

STATEMENT OF THE FACTS

The Statement of the Facts appearing in the Petition is substantially correct. The Respondent, however, refers this Court to the majority opinion in this case for a fuller and more accurate statement of the facts in this case (App. 9-11).

ARGUMENT

The statute in question certainly does not deprive the Petitioners of their lives, liberty or property without due process. Adoption was unknown at common law and was unknown at the time of the enactment of the 14th Amendment (The first Maryland adoption law was the Act of 1892, Chapter 244). The only "right" of the Petitioners is that granted by Maryland Statute to file a petition for and to be granted adoption upon a showing that the same was in accord with the best interest and welfare of the adoptive child. Obviously, this, in the opinion of the Lower Courts, they have not done. They have had their days in court and the judgment of properly constituted authorities denied the relief sought.

Due process can be involved only when there are existing rights to be defended. In the case of *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97, this Court stated that one aid to the decision of the question whether the denial of a certain right is a denial of due process is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. The crucial question is: Did those who then were formulating and insisting upon the rights of the people believe that the right was so fundamental that there could be no due process without it? (This passage quoted in *Slansky v. State*, 192 Md. 94, 63 A. 2d 599).

Due process of law is not violated if the Act operates without discrimination and in like manner against all persons of a class or because it is deemed in a particular case to work an inequitable result. *Poulas v. New Hampshire*, 345 U. S. 395, 75 S. Ct. 760, 97 L. Ed. 1105; *Owenby v. Morgan*, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837; *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122.

The contention of the Petitioners that they have been denied equal protection of the law on religious grounds is not supported by the facts of this case. Certainly they are not singled out by the statute in question by reason of their particular color, creed, race, prior condition of servitude or location. Certainly the statute does not confer any additional right unto, nor does it discriminate against any particular creed, sect, belief or religious formula. Certainly the statute establishes no religion nor does it deny the Petitioners the right to practice their faith.

While it is true that some courts have indicated that such a statute might be invalid if mandatory, it is patent that the Statute in question is not mandatory and is only directory or advisory, and, in fact, merely declaratory of the case law on the subject.

Goldman, Petitioner, 331 Mass. 647 (1954);
Matter of Santos, 278 App. Div. 373;
State, ex rel Baker v. Bird, 253 Mo. 569, 162 S. W. 119;
Describes v. Wilmer, 69 Ala. 25;
Jones v. Bowman, 13 Wyo. 79, 77 Pac. 439.

64 Col. L. Review 356 indicates that "almost all" of the states have enacted similar legislation.

The manifest good sense and purpose of a rule favoring adoption of babies by young adoptive parents over old ones need not be argued for the purposes of this inquiry, and but small effort needs be expended to recognize the futility

of the argument that such a rule is in derogation of the "due process" and "equal protection" clauses. It might as well be argued that laws against sales of liquor to minors or rules prohibiting employment of persons over a certain age are likewise discriminatory.

As has been indicated, the only "right" which the Petitioners could possibly assert in this case is one which they have already exercised, to wit: the filing of their Petition. The Respondent refers this Court to page 29 of the Record Extract filed by the Petitioners and, an agreement there reproduced by which the Petitioners expressly waived even this illusory "right". The Court of Appeals of Maryland did not find it necessary to pass upon the validity of this agreement. It is certainly to be considered at this point in that the Constitutional privilege which they seek to assert has long since been expressly waived by them.

CONCLUSION

It is respectfully recommended that the Petition for Writ of Certiorari in this case be denied (1) because the Supreme Court of the United States has no jurisdiction in this case, and (2) that there is no substantial Federal question to be decided.

Respectfully submitted,

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